No. 307.

Brf. of Long for D.

Filed Oct. 23, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901

No. 307

A. N. KING ET AL., PLAINTIFFS IN ERROR

vs.

THE CITY OF PORTLAND ET AL., DEFENDANTS IN ERROR

BRIEF OF DEFENDANTS IN ERROR

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(18,136.)

EDWARD BRO'S PR'T'G & L'TH. CO.

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STATEMENT OF THE CASE.

This was a suit instituted in the Circuit Court of the State of Oregon for Multnomah County, by A. N. King et al., against the City of Portland, a municipal corporation of the State of Oregon, and its officers.

The object of the bill was to restrain defendants from enforcing the payment of assessments against tracts and parcels of land belonging to complainants, situated in the City of Portland and abutting on Yamhill street in said city.

Said assessments were levied against said tracts of land to meet the expenses of improving said street, in pursuance of the provisions of the charter of the City of Portland and an order of the common council of said city.

The work was done in conformity with the requirements of the Portland city charter, by the adoption of a resolution by the common council of the city, which resolution was duly published for ten days in the newspaper doing the city printing.

Thereafter the owners of the majority of front feet on the street to be improved had a right, under the charter, within ten days after the final publication of the resolution, to file a remonstrance with the city auditor against the proposed improvement, thereby divesting the common council of the power to make the improvement.

Notice was also posted as requird by the charter on the street to be improved.

The complainants in this case were unable to secure a majority of the property-owners to remonstrate against the improvement, and thereupon they appeared and protested against the making of the improvement, and their protest in substance was that they deemed that the cost of the same was not warranted by the benefits that would accrue to the property by reason of the improvement. This remonstrance or protest was referred to the committee on streets, which had a regular day of meeting provided by its rules of order.

The committee met, and in behalf of the council investigated the remonstrance and protest, and reported against

the same to the common council. The common council, after considering the subject, overruled the remonstrance, and ordered the improvement to be proceeded with.

Thereupon the council certified their proceedings to the board of public works, who, under the charter, were authorized to let the contract. The board of public works caused notice to be published that they would receive bids for doing the work. The defendants Lind & Manning were the lowest and best bidders on each of the blocks in the improvement, and were awarded the contract for the improvement of the street. Thereupon a contract was duly enterd into between the City of Portland through its board of public works and Lind & Manning for the construction of this improvement. The contract provided that the work should be paid for by the property, and that the city should not be liable on account of the work.

When the improvement was completed, it was accepted by the city engineer as provided in the charter, and thereupon the board of public works caused notice to be published as required by the charter for parties to file objections to the acceptance of the work, and when they could be heard thereon.

No objections were filed to the acceptance of the work, and thereupon the board accepted the work and ordered it certified to the common council for assessment.

An assessment was prepared as provided by the charter, and certified to the common council, who thereupon passed an ordinance which was approved by the mayor declaring

the probable cost of this improvement to be $6850.96, and assessing the cost to the several lots in the manner provided in the charter, and directing the auditor to enter the assessment of probable cost in the docket of city liens.

The assessment of probable cost was prepared in a manner strictly complying with the statute, viz.: "Each lot or part thereof within the limit of the proposed street improvement abutting upon the street shall be liable for the full cost of making the improvement upon one-half of the street in front of and abutting upon it, and also for a proportionate share of improving the intersections of two streets." The charter of the City of Portland defines that each lot shall be deemed to be fifty by one hundred feet square, and regular blocks two hundred feet square. It provides in detail for assessing lots, blocks and tracts of land.

The theory upon which the assessment is made is that the property lying between the marginal line of the street and one-half of the distance to the marginal line of the next street shall be liable for the full cost in front of the property to the center of the street.

Thereupon the auditor in compliance with the charter caused notice to be published for ten days in the newspaper doing the city printing, and sent through the mail to each of the parties a notice that the assessment of the probable cost had been made and would be due and payable within ten days.

Section 153 of the charter provides that if, upon the completion of any improvement, it is found that the sum

assessed as the probable cost is insufficient to pay the cost of the improvement, the council shall declare the deficit and it shall be a lien in like manner and with like effect as the assessment of the probable cost.

Section 154 of the charter provides that if the amount assessed is in excess of the cost, the council must ascertain and declare the surplus in like manner as the deficit, and when so found must be entered in the docket of city liens, thus giving the property-owners an opportunity to show to the council if any errors or mistakes have been made, and providing the method whereby the council can correct the same. The sections of the charter covering street assessments are sections 126 to 161, inclusive, pages 150 to 165, inclusive, Special Session Laws of 1898.

All the parties with the exception of the plaintiffs paid their assessments. Plaintiffs neither having paid their assessments, nor sought to have the common council make any corrections of the same, nor in any manner showed to the common council that mistakes had been made, the council, after waiting over two months, directed the auditor to issue a warrant to the chief of police, directing him to sell plaintiffs' property, for the purpose of securing payment of their assessments. The chief of police having advertised the property for sale as required by law, thereupon complainants brought this bill in equity and secured a restraining order enjoining the sale pending the hearing of this case.

This method of assessment has been in vogue in the State of Oregon since 1864, and was first affirmed by our supreme court in *King* v. *Portland*, 2 Or. 147, during the

year 1866, and has frequently been before our courts since that time, and has uniformly been sustained where the statutes have been complied with, so much so, that it has become a rule of property in the State of Oregon and was recognized as such by our own supreme court in the case at bar.

When the case was tried out in the circuit court, the court found against the plaintiffs upon all the allegations in the complaint, and found that the common council did take into consideration the question as to whether the property was benefited by the improvement, and the amount of such benefits, and that the cost assessed against the property did not exceed or equal the benefits that accrued to the property by reason of said improvement; that plaintiffs and each of them had notice of the amount of such assessment before the same was made and entered in the docket of city liens, and that plaintiffs and each of them had an opportunity to test the question as to whether said property was benefited; and that the common council exercised judgment and discretion in all matters submitted to them to be acted upon; and that the defendant was entitled to judgment and a decree sustaining the validity of the assessment.

Thereupon a decree was entered in favor of defendant, dismissing the bill.

From this decree plaintiffs appealed to the Supreme Court of the State of Oregon, where the decree of the circuit court was affirmed in *King* v. *Portland*, 63 Pac. 2. Thereupon a writ of error from this court was allowed.

The only foundation for the bill is the allegation that

the plaintiffs did not have notice or knowledge of the said assessment so pretended to be assessed against their property at any time before the same was made, or before the same was entered in the docket of city liens, and that they had no opportunity to test the fairness of the apportionment, or whether the property was benefited, or the amount of said assessment, and further, that the common council did not exercise judgment or discretion concerning the same, and that by reason thereof, the proceedings were void as an attempt by the city to take the property of the plaintiffs away from them without due process of law, contrary to the fourteenth amendment of the Constitution of the United States, and also section 4 of article 11, section 32 of article 1, and section 18 of article 1 of the Oregon State Constitution. There is no allegation or claim of any kind that the municipal authorities in any manner disregarded any provision of the statutes or ordinances, or that complainants' property had been charged differently from that of any other lot owner.

The complainants do not base their claim upon any allegation that any of the proceedings to improve Yamhill street had been a departure from the provisions of the statutes or ordinances, or that there had been attempted any discrimination against them or their property, nor is it claimed that it is not a settled law of the State of Oregon that the method prescribed of meeting the expenses of street improvements by apportioning the entire cost of such improvement upon the abutting land, and each lot and part thereof for the full cost of making the same upon one-half the street in front of and abutting upon it. In fact, the only foundation for the

bill, so far as this court is concerned, is found in plaintiffs' allegation that the provisions of the act of the legislature incorporating the City of Portland, in respect to improvements and assessments for making the same upon the property affected, are null and void, and opposed to the provisions of the fourteenth amendment to the Constitution of the United States.

POINTS OF LAW AND FACTS.

General allegations in a pleading always yield to specific statements.

Wyeld v. *Or. Short Line*, 21 Or. 59.

Therefore, when the pleader alleges that the proceedings are null and void and an attempt to deprive plaintiff of his property without due process of law, which statement is followed by a specific allegation, setting forth wherein the city failed (Abstract, page 10), the general allegation yields to the particular allegation, wherein plaintiff describes in what manner the federal constitution is violated.

Wyeld v. *Ry.*, *supra*.

The sections of the city charter under which the four separate and distinct notices were given, referred to in the complaint and in the decision in the case of *King* v. *Portland*, 63 Pac. 2, are as follows: (Special Session Laws of 1898, pp. 151, 152, 155, 158, 159).

Sec. 128. "Before any work is done or improvement made, which is authorized by section 127 of this act, except as otherwise prescribed in the preceding section, the common

council shall pass a resolution of intention so to do, and describing the work or improvement, which resolution shall be posted conspicuously for ten days in the office of the auditor, and shall be published for ten consecutive days in a daily paper published and circulated in the City of Portland. The city engineer shall, within three days from the first publication of the notice herein provided for, also cause to be conspicuously posted at each end of the line of said contemplated work of improvement. Said notice shall be headed 'Notice of Street Work,' in letters of not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resoultion aforesaid, its date, and, briefly, the character of the work or improvement proposed, and the time within which written objection or remonstrance may be made thereto. The engineer shall file with the auditor an affidavit of the posting of said notices, stating therein the date and places where the same have been posted."

Sec. 132. "Said board of public works shall, without delay, cause the city engineer to prepare and file with said board, estimates and specifications in detail of the amount of such work of improvement, and shall thereupon give notice by publication for not less than five successive days in the city official newspaper, inviting proposals for doing the work or improvement so ordered by the common council, referring to the estimates and specifications on file therefor."

Sec. 137. "Whenever any work or improvement, the expense of which is to be assessed against the property benefited thereby, has been completed in whole, or in such pro-

portion as shall enable the said board of public works to determine the cost of the whole thereof, the city engineer shall file with the said board a written acceptance of such work so completed. Thereupon the said board shall publish a notice of such completion and acceptance for six consecutive insertions in the city official newspaper, stating therein a time and place where any written objections to the acceptance of said work or improvement, or portion thereof, may be heard, which time shall not be more than ten days after the date of the filing of said acceptance as aforesaid. At the time set for hearing objections to the acceptance of said work any owner or agent of any property affected by said work of improvement may appear and file objections thereto, which shall be heard and determined by said board, and if it appear that said work or improvement has not been completed in accordance with the specifications and contract the said board shall direct the same to be so completed, and until so done the acceptance or acceptances aforesaid shall not be approved by said board. If no objections be filed to the acceptance of any work or improvement as herein provided, or if upon hearing the same, the board shall determine that the work or improvement has been completed according to the specifications and contract, it shall endorse its approval on said acceptance or acceptances, and thereupon file a copy thereof with the auditor, together with a copy of the contract or contracts for the whole of said work or improvement, and the estimated expenses of engineering, superintendence and advertising, which expenses shall be deemed a portion of the cost of such improvement."

Sec. 141. "The docket of the city liens is a public

writing, and from the date of the entry therein of an assessment upon a lot or part thereof, or a tract or parcel of land, the sum so entered is hereby declared to be a tax levied, and a lien upon such lot, part thereof, or tract or parcel of land, which lien shall have priority over all other liens or incumbrances thereon whatsoever, and any sum or sums of money assessed for the improvement or repair of a street, avenues or alley, or for the construction or repair of a sewer or drain entered upon such lien docket, shall not be collected until, by order of the common council, ten days' notice is given by the auditor of such entry as aforesaid, by publication in a daily newspaper published in the City of Portland, and it shall be the duty of such auditor to send a notice of such assessment by mail when the postoffice address of the owner, or agent, is known."

Sec. 142. "If within thirty days from the first publication of the notice prescribed in section 141 the sum assessed upon the lot or part thereof is not wholly paid to the city treasurer, and a duplicate receipt therefor filed with the auditor, the council shall thereafter order a warrant for the collection of the same, to be issued by the auditor, directed to the chief of police."

The plaintiffs allege that the common council gave the notices required by these sections. This constitutes a sufficient notification to those interested in the question, and gives them an opportunity to be heard before the council. Therefore, it is due process of law.

Lent v. *Tillson*, 140 U. S. 316.
Hagar v. *Reclamation Dist.*, 111 U. S. 701.

Paulsen v. *Portland*, 149 U. S. 30.
Fallbrook Irrig. Dist. v. *Bradley*, 164 U. S. 112.
Mattingly v. *Dist. Columbia*, 97 U. S. 687.
Parsons v. *Dist. Columbia*, 170 U. S. 45.
Wight v. *Davidson*, 181 U. S. 371.
King v. *Portland*, 63 Pac. 2.
Wilson v. *Salem*, 24 Or. 504.
Bellingham Bay Co. v. *New Whatcom*, 172 U. S. 320.
Spencer v. *Merchant*, 125 U. S. 345.
Kelly v. *Pittsburg*, 104 U. S. 78.
Kentucky Ry. Tax Cases, 115 U. S. 321.
Davidson v. *New Orleans*, 96 U. S. 97.
French v. *Barber Asphalt Paving Co.*, 181 U. S. 324.
Norwood v. *Baker*, 172 U. S. 269.
Tonawanda v. *Lyon*, 181 U. S. 382.
Webster v. *Fargo*, 181 U. S. 394.
Cass Farm Co. v. *Detroit*, 181 U. S. 396.
Detroit v. *Parker*, 181 U. S. 399.
King v. *Portland*, 63 Pac. 2.

The legislature has power to create and fix a district which shall be liable for a given tax without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local improvement.

Davidson v. *New Orleans*, 96 U. S. 97.
Fallbrook Irrig. Co. v. *Bradley*, 164 U. S. 112, 174.
Spencer v. *Merchant*, 125 U. S. 345.

The legislature has a right to decide for itself the question of benefits.

Davidson v. *New Orleans*, 96 U. S. 97.
Spencer v. *Merchant*, 125 U. S. 345, 353, 355.
Walston v. *Nevin*, 128 U. S. 578.
Fallbrook Irrig. Co. v. *Bradley*, 164 U. S. 112, 175.
Cass Farm Co. v. *Detroit*, 181 U. S. 396.
Wight v. *Davidson*, 181 U. S. 371, 379.

The provisions of the charter providing for the manner of laying the assessment are as follows: (Special Session Laws of 1898, pp. 156-157.)

Sec. 138. "Each lot or part thereof within the limits of the proposed street improvement abutting upon the street shall be liable for the full cost of making the improvement upon one-half of the street in front of and abutting upon it, and also for a proportionate share of the cost of improving the intersections of the streets bounding the block in which the lot or part thereof is situated. * * * The cost of improving the intersections of the streets, unless otherwise ordered by the council, shall be assessed upon the lots or parts thereof situated in the quarters of the four regular blocks adjoining such intersection, and only upon the lots or parts thereof within the quarter blocks nearest thereto, and in the following proportion: Five-ninths of the cost to the corner lot or first fifty feet, and four-ninths of the cost to the lot next inside, or the next fifty feet, as laid out in the recorded plats. * * * Blocks two hundred feet square shall be deemed regular blocks and lots fifty by one hundred feet shall be deemed regular lots."

This is the legislative taxing district and apportionment and is due process of law within the rule laid down in

Walston v. *Nevin*, 128 U. S. 578.
Davidson v. *New Orleans*, 96 U. S. 107.
Mattingly v. *Dist. Columbia*, 97 U. S. 107.
Lent v. *Tillson*, 140 U. S. 316.
Hagar v. *Reclamation Dist.*, 111 U. S. 755.
Mobile Bay v. *Kimball*, 102 U. S. 691.
Fallbrook Irrig. Dist. v. *Bradley*, 164 U. S. 112.
Tonawanda v. *Lyon*, 181 U. S. 382.
Webster v. *Fargo*, 181 U. S. 394.
Wight v. *Davidson*, 181 U. S. 371.

The notices issued under the statute were all the notices that plaintiffs were entitled to upon the question of apportionment, and as such, they constituted due process of law.

Paulsen v. *Portland*, 149 U. S. 30, 40, 41.
Lent v. *Tillson*, 140 U. S. 316, 326, 328.
Wight v. *Davidson*, 181 U. S. 371, 381, 382.

The state's interpretation of the law whereby due process of law is secured is controlling upon a tax question.

Lombard v. *West Chicago Park Com.*, 181 U. S. 33, 43.
Spencer v. *Merchant*, 125 U. S. 345, 353.
Castillo v. *McConnico*, 168 U. S. 674, 683.
Eldridge v. *Trezevant*, 160 U. S. 452, 468.

The sections of the charter in reference to surplus and deficit are as follows: (Special Session Laws of 1898, pp. 162, 163.)

Section 153. If, upon the completion of any improve-

ment of a street or construction of a sewer, it is found the sums assessed therefor upon any lot or part thereof are insufficient to defray the cost thereof, the council must ascertain the deficit and declare the same by ordinance; when so declared the officer must enter the sum of the deficit in the docket of city liens in a column reserved for that purpose in the original entry, with the date thereof, and such deficit shall thereafter be a lien upon such lot or part thereof, in like manner and with like effect as in case of the sum originally assessed, and shall also be payable and may be collected in like manner and with like effect as in the case of such sum so assessed.

Section 154. If, upon the completion of any improvement of a street or construction of a sewer, it is found that the sum assessed therefor upon any lot or part thereof is more than sufficient to pay the cost thereof, the council must ascertain and declare the surplus in like manner as in the case of a deficit; when so declared it must be entered as in case of a deficit in the docket of city liens. Thereafter the person who paid such surplus, or his legal representative, is entitled to repayment of the same by warrant on the city treasury, payable out of the fund raised for such improvement.

The notices given by the board under section 137 *supra* of the proposed acceptance of the work, and by the auditor under section 141 *supra*, were sufficient to require the complainants to make objections, if any they have, as to the apportionment of the assessment, and as to whether the assessment has been correctly apportioned as required by the statute.

Lent v. *Tillson*, 140 U. S. 316, 328, 329.
Paulsen v. *Portland*, 140 U. S. 30, 41.
King v. *Portland*, 63 Pac. 2.

ARGUMENT.

The appellants have assigned twenty-five errors. They all relate to the same matter—the question as to whether the appellants have had due process of law under the fourteenth amendment to the Constitution of the United States.

The law under which this assessment was made has been in force since 1864 in the State of Oregon. It was first challenged in the case of *King* v. *Portland*, 2 Or. 147, where the law was sustained. It has since been sustained in several cases by the Supreme Court of the State, although that question was not directly raised except in *Wilson* v. *Salem*, 24 Or. 504, where *King* v. *Portland* was cited and approved, and again in *King* v. *Portland*, 38 Or. 402 (63 Pac. 2).

It seems to have been generally recognized by the courts of the state that the method of assessment is a just and equitable one. It was adopted at a time when there were but few towns in the state, and when the City of Portland was in its infancy. Since that time, and in the City of Portland alone, there have been 209 miles of streets graded, 306 miles of wooden and 20 miles of cement sidewalks, and some 40 miles of crosswalks built. Of the graded streets, all but 77 miles have been improved, either with macadam, asphalt, stone or wooden blocks. Seven miles of elevated streets, similar to the one in controversy, have been constructed. Many of these streets have been re-improved sev-

eral times. Streets in the immediate vicinity of Yamhill street, which is in controversy, and similarly situated, constructed on piles, have been redecked four or five times.

This street in controversy lies in the middle of the city, starting within a half block of the water front and running across a piece of lowland. All the streets in that vicinity are similarly situated, and all the buildings constructed are constructed upon the line of the grade established by the city, and upon the line of grade on which this street was built. Evidence in the case at bar shows that the building of this street as it was built and the grade upon which it was built increases the value of every lot along the street at least $1000. The court found as a fact that the building of this street was a benefit to the property in excess of the cost thereof.

Thus it will be seen that under a method similar to the one pursued in the case at bar, millions of dollars have been paid out, thousands of tax bills have been laid and collected, until they pass as current in our market as national bank notes.

In my opinion, the question would not now be in the supreme court, except for a misapplication of the rule announced in *Norwood* v. *Baker*, 172 U. S. 269.

Since 1863 the legislature of the State of Oregon has given the City of Portland eight or nine charters. All of these charters provide for the same method of making street improvements and paying for the assessments therefor, except in some of them the assessment was laid instead of upon

a lot one hundred feet deep, upon the tract of land fronting upon the street.

In the City of Portland there are no alleyways. The lots are usually fifty by one hundred feet, the blocks two hundred by two hundred feet. The legislature, under the charter in controversy, recognized this fact and declared that they should be considered as regular blocks. There are no tracts in the case in controversy, and these are regular lots and blocks as defined by the legislature, and which the legislature provided should be liable for the cost of the improvement in front of each lot for one-half of the street and for the intersections. The difference in price of the assessment as found in the abstract is made up largely of lots assessed for intersections.

The supreme court in the case at bar (63 Pac. 2), has held that the property-owners had due notice and opportunity to be heard upon all the matters that were left to the consideration, judgment or discretion of the council, which is the body, under the charter, that is authorized to initiate the improvement. Therefore, it seems to me that the only question with which we have any concern is as to whether the law contravenes the fourteenth amendment of the federal constitution, relative to depriving a person of his property without due process of law.

The law which prescribes the time when complaints against the proposed improvement can be heard is due process of law, and this opportunity is clearly given under the charter of the City of Portland at various times under the notices required to be published.

Hagar v. *Reclamation* Dist., 111 U. S. 709.
Palmer v. *MacMahon*, 133 U. S. 661.
Bell's Gap R'd Co. v. *Penn.*, 134 U. S. 233.
Pittsburg v. *Backus*, 154 U. S. 421.
Kentucky R. R. Tax Cases, 115 U. S. 321.
Spencer v. *Merchant*, 125 U. S. 345.
Murray v. *Hoboken Land Co.*, 18 How. 272.
Fallbrook Irrig. Dist. v. *Bradley*, 164 U. S. 112.

Counsel attacks the law on the ground that the plan of assessment arbitrarily fixes the amount of said assessment without reference to any special benefit, and without any apportionment whatever. In other words, the contention of counsel is that an apportionment should be made on a theory like an assessment, upon an *ad valorem* basis. We do not understand that that is necessary. If the legislature had prescribed that method and required an assessment to be made upon an *ad valorem* valuation, then it would be necessary to have an apportionment to have acquired that equality that is necessary, but where the legislature has selected a district or declared that certain property shall be liable for the cost of any improvement, defining what property is, then there has been a legislative selection of the property that shall be liable.

The legislature has left it to the council to decide when an improvement shall be made and the character thereof. Allowing the council to decide when it is necessary to make an improvement, subject always to the right of a majority of the property-owners to remonstrate against the same, is a discretionary question submitted for their consideration.

The court found in the case at bar that public necessity required the improvement of this street, and that the improvement of the same would be a benefit to the property charged with the cost thereof to an amount far in excess of the cost: Abstract, pp. 13, 14.

The wisdom of their judgment is shown by the fact that a majority of the property-owners along the street proposed to be improved refused to join in a remonstrance against making this improvement, and have paid for their assessment.

Whenever the council caused the first notice of intention of improvement to be published, as required by the statutes, and posted upon the street line as required by the statute for the length of time designated in the statute, they acquired jurisdicion to make this improvement, subject only to be ousted by a remonstrance of a majority of the owners of the property abutting upon the proposed improvement, who are entitled to remonstrate against the improvement.

The law in the case at bar operated alike upon all persons similarly situated. There was no discrimination in favor of one as against another of the same class.

Bell's Gap R. R. Co. v. *Penn.*, 134 U. S. 232.
Pacific Express Co. v. *Seebert*, 134 U. S. 594.
Home Ins. Co. v. *New York*, 132 U. S. 594.

"Due process of law within the meaning of the amendment is obtained if the laws operate upon all alike and do not subject individuals to an arbitrary exercise of the power of government."

Leeper v. *Texas*, 139 U. S. 462.
Henderson Bridge Co. v. *Henderson*, 173 U. S. 592-605.
Jones v. *Brin*, 165 U. S. 180-4.
Hayes v. *Missouri*, 120 U. S. 68-72.
Barbier v. *Connolly*, 113 U. S. 32.
Missouri v. *Lewis*, 101 U. S. 22.

"And the repugnancy between the federal constitution and the law must be too clear to admit of dispute before the law will be declared unconstitutional."

Henderson Bridge Co. v. *Henderson*, 173 U. S. 592-605.
Atchison, Topeka & Santa Fe R. R. Co. v. *Matthews*, 174 U. S. 96-102-3-4.

The laws authorizing assessments for the improvement of streets, construction of levees, sewers and drains, the opening up of highways, the acquiring of parks, the irrigation of lands, have all been quite generally held by the courts to be constitutional, and unless the law contravenes some constitutional provision of the state, it has been quite generally held valid. The federal court has quite generally confined itself to the question as to whether the law furnished equal protection to all citizens under like circumstances and conditions that become subject to its operation.

The legislature has the undoubted right to select the taxing district, or leave the selection of the taxing district to some competent body. In the case at bar, the legislature has selected the district, and has made proper provision for notices giving the property-owners an opportunity to be

heard. This having been done, the federal court will not concern itself with any complaint that a party might make as to whether another method might be adopted by the legislature, which would more nearly do exact justice under the circumstances. The legislature having declared by the enactment that the property would be benefited, placed a legislative construction upon the law, the power being vested in the legislature, and the courts holding quite generally that levying an assessment upon adjacent and contiguous property is constitutional. This is the legislative construction of equality, and what is considered just must be accepted by the courts, for, as was said in *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96:

"Does the power of the legislature depend on the method it pursues to accomplish the result? As individuals, we may think it better that the legislature prescribe the specific duties which the corporation must perform; we may think it better that the legislation should be like that of Missouri, prescribing an absolute liability, instead of that of Kansas making the fact of fire *prima facie* evidence of negligence; but clearly as a court, we may not interpose our personal views as to the wisdom or policy of either form of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the court."

Then, after quoting from *Barbier* v. *Connolly*, 113 U. S. 27, wherein the court declares in general terms what the fourteenth amendment was designed to secure, the court says:

"This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. * * * It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

This rule especially applies to the case at bar. If a law has ever been fairly before the legislature and been fairly considered, this law has. Several times the charter of the City of Portland has been amended or revised, and in each instance the legislature has practically re-enacted the same law, having before it the decision of *King* v. *Portland*, 2 Or. 147.

Cooley on Const. Lim., pp. 219-220.

Furthermore, if what constitutes equality were known, and if equality were practicable, in what branch of the government would power to enforce it reside? Not in the judiciary, unless it was competent to set aside a law free from collision with the constitution, because it seemed unjust. It could interfere only by overstepping the limits of its sphere, by appropriating to itself a power beyond its province, and by taking upon itself the duty of defining forms as well as considering powers and results.

"Power to determine the person or object to be taxed is entrusted exclusively with the legislature, but over all these objects the burden must be spread; or it must be unequal and unlawful as to such as are selected to make the payment."

Cooley on Const. Lim., p. 604.

In the case of *Henderson Bridge Co. v. Henderson*, *supra*, p. 616, the court says:

"In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received."

The court will not question the details by which one party seemingly may pay slightly more than another, for if the law is so framed that it has a reasonable relation to the objects to be attained, the courts will not undertake to ascertain to what extent the burdens imposed are out of proportion to the benefits received. There must necessarily be a wide range of discretion vested somewhere, as to the particular subjects of property, as well as the extent of territory within which a local tax shall operate; or, as the courts sometimes put it, it must be palpable that persons or property are subject to a local burden for the benefits of others, or for purposes in which they have no interest, and to which they are therefore not justly bound to contribute. The case must be one, as has been frequently said by this court, in which the operation of the law will be at first blush pro-

nounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished.

Under all the rules, while states have differed in their legislation, it is quite generally conceded that the legislature has the right to select the district and authorize a local assessment for street improvements, and all the courts having decided that the legislature has this power, therefore the question as to whether or not in a given case, an assessment upon a particular piece of property might be in substantial excess of the benefits accruing to that property by means of the improvement for which the assessment was laid, would in no manner affect the constitutionality of the law, for the reason that while the law might effect a hardship in a particular case, the hardship does not constitute a constitutional objection; for under our form of government, the fact that a hardship is created does not create a constitutional right, or the fact that conditions may arise by which a person is seemingly favored by the law, does not create a constitutional right or an unconstitutional law. Therefore, it must be conceded that the right to assess the adjacent property for a street improvement is constitutional, and that matters of detail do not affect the constitutionality of the assessment.

Motz v. *Detroit*, 18 Mich. 522.
Davidson v. *New Orleans*, 96 U. S. 97.

In *Witherspoon* v. *Duncan*, 4 Wallace, 210, it is held that states, as a general rule, have a right to determine the

manner of levying and collecting taxes on private property. As Judge Cooley says, "The power to impose taxes is one so unlimited in force, so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rests in the discretion of the authority that exercises it" (Cooley on Const. Lim., 587), and to the states must be left this vast power for self-existence.

The basis of all taxation is political necessity. Without taxation there can be no revenue; without revenue there can be no government; and as Justice Field said in *State Tax on Foreign-Held Bonds*, 15 Wallace, 319, "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. * * * It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures and in transportation. Unless restrained by the provisions of the federal constitution the power of the state as to the mode, form and extent of taxation is unlimited." The general powers of taxation always were inherent in our government, and when the fourteenth amendment came, it found them vested in the states, and no claim can plausibly be made that these established powers of taxation were impaired or narrowed by that amendment.

As was said in *Memphis Gas Light Co.* v. *Shelby Co.*, 109 U. S. 398, "The United States Constitution does not profess in all cases to protect property from unjust or oppressive taxation by the states." And it is only when the law trenches upon federal authority, or rights secured or

recognized by the federal constitution that the United States courts will grant relief from the unfairness of a law: *Kirtland* v. *Holkiss*, 100 U. S. 491.

In *Kelly* v. *Pittsburg*, 104 U. S. 78, the claim was made that the tax was contrary to the fourteenth amendment, but the court held that "Although differing from proceedings in courts of justice, the general statement of procedure for he levying and collection of taxes which is established in this country is, within the meaning of the law, due process of law; and that a party is not deprived of his property without due process of law by the enforced collection of taxes."

If the proposition of counsel be true, it would be necessary in the case of any taxes or assessments for improvements for any public purposes or improvement, to have an inquiry as to the special benefits or special burdens conferred upon taxpayers, and make them compensation equivalent to the tax. Obviously, this proposition is not true; otherwise, it would amount to stating that no tax for public improvement could be levied upon the owner of private property, unless a *quid pro quo* was given to him. This would revolutionize tax matters. The rule might be applicable to the taking of property by eminent domain, but would not apply to the subject of taxation. Taxation is a requirement by the government of a contribution, and if it is for general purposes, the presumption of benefits conclusively arises. If it is an assessment for benefits that an individual receives in addition to the benefits that all people receive, then the law is satisfied if he have notice and an opportunity to be heard

upon those matters that the legislature has submitted to the officers to pass upon.

Assessment of benefits is one of the sovereign attributes of the state, and is only subject to the constitutional condition that the act authorizing the assessment shall not charge as benefits that which is not special benefits, or can from the act itself be seen to be substantially in excess of the actual benefits. It seems to us that the legislature has acted wisely in the matter at bar. They have left the question as to when a repair or improvement should be made to the common council, to be acted on by it only when due notice has been given to the property-owners interested, and an opportunity allowed them to present themselves and show what reason they have, if any, why the improvement should not be made, and should a majority remonstrate, then the improvement falls, and the question of an individual hardship does not affect the constitutionality of the law, as I have said, for the property-owner has his opportunity to be heard. For it is to be presumed that had he presented reasonable and substantial objection, then the common council would have refused to proceed with the improvement.

In the case at bar, the plaintiffs presented a petition to the council, asking them to stop the improvement, because the petitioners claimed that the cost would be in excess of the benefits to their property, but the council found that this was not true as a matter of fact, and the court found as a fact that the benefits were largely in excess of the cost. Plaintiffs claim that the method does not admit of what they think is a correct apportionment. In other words, their idea

of apportionment differs from that of the legislature, but, as a matter of fact, from an engineering standpoint, the method of assessment adopted by our statutes is the only true and correct method to be pursued. The grade is first established by the engineering department and ratified by an ordinance, which cannot be changed without the consent of the property-owners. This becomes a law of the municipality ,and is notice to all parties interested. The grade is established upon an engineering basis, having in view the general necessities of the community, and a desire to harmonize the uneven surface of the ground, so that there will be the least possible waste of dirt and yet secure an easy gradation. The bidders are required to bid upon each block separately, and bid upon the cost of cuts and fills, thus reducing the method of assessment to as nearly a scientific basis as human ingenuity can secure. It is the basis that is now adopted upon all public works, by all engineers of recognized ability. Criticism cannot be directed to the manner of the distribution of the cost other than that of the cuts and fills, for the balance of the cost must, by the very necessities of the case, be uniform throughout the block. The legislature has provided for lots fifty by one hundred feet, thus reducing the possibility of abuse to the minimum. It has deprived parties of the opportunity to speculate, taking into consideration the relative cost of cuts and fills, and as a matter of fact, it is the method now adopted by the most scientific engineers upon public works. It is much safer and more just than the frontage assessment, or the method of *ad valorem* valuation, or even upon the basis of benefits. It is not open to the criticism of favoritism. All persons

under the same circumstances are treated exactly alike. The courts can under this law promptly stop any improvement which invades the rights of individuals. The property-owner knows exactly what he is paying for. He pays for what he receives, what is placed in front of his lot for his benefit. The system is absolutely free from the abuse of discrimination, and must from the very nature of things be more satisfactory than any other method of assessment. The theory of the law does exact an equal justice to all.

Counsel in the case at bar undertakes to consider the question of the physical condition of the property. The court in the case at bar finds that the physical condition and situation of this property is such that it is benefited by this improvement.

But this is not a physical question. As was said in *Illinois Central Ry.* v. *Decatur*, 147 U. S. 190, when the city has authority under its charter to do so, it should cause the improvement in front of a lot to be paid for according to its frontage, and such action by the city is final and can neither be disputed nor disturbed. And as was said in *Parsons* v. *District of Columbia*, 170 U. S. 45, quoting from Judge Dillon's work on Municipal Corporations, as to whether an assessment should be made upon the property found to be benefited or alone upon the abutters, according to the frontage, or according to the area, is a question of legislative expediency. And in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 293, where there was a tax levied upon an inheritance, under the inheritance tax law of Illinois, the court says: "The appellant attacks both its principles and

provisions—its principles as necessarily arbitrary, and its provisions as causing discriminations and creating inequality in the burdens of taxation," and discusses the question as to what constitutes equality before the law. After citing *Kentucky R. R. Tax Cases*, 115 U. S. 321, 337, the court says: "With these for illustration, it may be safely said that the rule prescribes no rigid equality, and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern."

As was said in *Davidson* v. *New Orleans*, 96 U. S. 97, 107, where an assessment was levied upon a superficial area of land situated within a drainage district as would pay for the cost of construction. The effect of this law was to require each piece of land to pay for the improvement in proportion to the feet the tract sustained to the whole number of superficial feet in the district. The effect was to require each foot to pay for the assessment, whether it received the same amount of benefit or not, or whether it would cost as much to drain one tract as it would another. It was complained that the amount of assessment upon plaintiff's land was excessive, and that part of the land received no benefit at all. To that argument the supreme court replied that it was a matter of detail so far as that court was concerned. It was not a constitutional question, therefore was not reviewable. In *Walston* v. *Nevin*, 128 U. S. 578, where the law required that the improvement should be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of square feet owned by them re-

spectively, except corner lots (thirty feet front and extending back as may be prescribed by ordinance), should pay twenty-five per cent. more than others for such improvement, and each subdivision bounded on all sides by principal streets is to be deemed a square, this law was attacked as contrary to the fourteenth amendment to the federal constitution, as taking property without due process of law, and denying equal protection of the law.

Mr. Chief Justice Fuller, speaking for the court, in *Walston* v. *Nevin*, *supra*, p. 581, says: "The statute has been repeatedly before the Kentucky Court of Appeals, which has sustained it as constitutional and proper legislation, the powers vested thereby in the local government being subjected to the supervision of the courts, 'where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation,'" citing Kentucky authorities; and after citing *Davidson* v. *New Orleans*, *supra*, the court says: "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is equal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power."

This case in principle is almost identical with the case at bar. The supreme court held that questions of arbitrary or illegal methods of assessment were matters for the legislature to consider, to which body is given the discretion to create the district and provide the means of payment.

In *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, the court held that the idea of classification of property for the purpose of assessment is that of inequality, and the fact of inequality in no manner determines the constitutionality. In tax matters, an approximation is all that can be hoped for. "Force and effect must be given to the legislative will in this respect." And as was said in *Bellingham Bay Co.* v. *New Whatcom*, 172 U. S. p. 320, "Before proceedings for the collection of taxes sanctioned by the supreme court are stricken down in this court, it must clearly appear that some of the fundamental guarantees of right contained in the federal constitution have been invaded."

Again in *Bell's Gap R'd Co.* v. *Penn.*, 134 U. S. 237, the court said: "We think we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation."

The taxing power necessarily involves and includes among other things the power of apportionment, that is, the power to choose the persons or things to be taxed, or according to what rule or measure the amount or share to be paid by each shall be determined. It would be idle for a legislative body to say that so many dollars' tax be paid to the government, unless it also went further and prescribed what

persons or things should pay the same, and in what amounts or according to what measure or rule.

Historically, then, it seems clear that the words "due *process of law*," *found in the* fourteenth amendment, have no reference to the exercise of the power to tax, including the power to apportion taxes. The protection against unfair or excessive taxation is found in those parts of the constitutions of the several states and of the United States, which assure a representative government, that is, a government in which the legislators are elected by the people.

And as was said by Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Peters, 514, in a tax case on writ of error to the Supreme Court of Rhode Island (p. 563): "However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments."

The same rule was laid down by the supreme court in the case of *County of Mobile* v. *Kimball*, 102 U. S. 691; in *Hagar* v. *Reclamation Dist.*, 111 U. S. 755; in *Louisiana* v. *Pillsbury*, 175 U. S. 278, and was so clearly stated by the supreme court lately in *Tonawanda* v. *Lyon*, 181 U. S. 389, where, speaking of *Norwood* v. *Baker*, the court says: "It was not the intention of the court, in that case, to hold that the general taxing system of the state, long existing as valid and sustained by the courts, has been set aside by the four-

teenth amendment to the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the state the same protection against arbitrary state legislation *affecting life, liberty and property*, as is offered by the other five amendments against similar legislation by congress," and after showing the injustice in *Norwood* v. *Baker*, they say that the facts in *Tonawanda* v. *Lyon* do not show any abuse of the law, nor that the burdens imposed on the property of the complainants were other than those imposed upon property of other persons in like circumstances.

Equality before the law has been satisfactorily proclaimed by our supreme court. As was said in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, p. 334: "We have so often decided that we cannot review and correct errors and mistakes of state tribunals on that subject, that it is only necessary to refer to these decisions for a restatement of the arguments on which they rest."

In *Lent* v. *Tillson*, 140 U. S. 316, a suit brought to test the validity of the statute of the State of California authorizing the supervisors of San Francisco to widen Dupont street, which statute provided that the value of the land taken for the widening of the street, and all expenses incident to such widening, and the damages to improvements thereon or adjacent thereto, "shall be held to be the cost of widening said street, and shall be assessed upon the district hereinafter described as benefited by said widening." The district defined "shall be bounded on the north by the southerly line of Bush street, and on the south by the northerly

line of Market street. The benefits of the improvement were to be apportioned by the commissioners, with the right of the majority of the property-owners to defeat the widening of the street by petition. After quoting from *Spencer* v. *Merchant*, 125 U. S. 345-355, the court says: "Tested by these principles, the widening of Dupont street cannot be held to be repugnant to the constitutional requirement of due process of law. The notice by publication to all who owned property liable to be assessed for the cost of that improvement was appropriate to the nature of the case, and was reasonable in respect to the length of time prescribed for the publication. * * * If we had any doubt of the correctness of these views, we should accept the interpretation which the highest court of the state places upon the statute."

To the same effect are the following decisions:

Hagar v. *Reclamation Dist.*, 111 U. S. 709.
Parsons v. *Dist. Col.*, 170 U. S. 45.
Fallbrook v. *Bradley*, 164 U. S. 112.
French v. *Barber Asphalt Paving Co.*, 181 U. S. 324.
Wight v. *Davidson*, 181 U. S. 371.
Tonawanda v. *Lyon*, 181 U. S. 389.
Webster v. *Fargo*, 181 U. S. 394.
Davidson v. *New Orleans*, 97 U. S. 97.
Spencer v. *Merchant*, 125 U. S. 324.
Stanley v. *Street Supervisors*, 121 U. S. 535.
Giozaat v. *Tiernan*, 148 U. S. 659.
Bell's Gap R'd Co. v. *Penn.*, 134 U. S. 232.
Atchison, Topeka & Santa Fe R. R. Co. v. *Matthews*, 174 U. S. 96.

Jones v. *Grimm*, 165 U. S. 183.

The plaintiffs have had due process of law under the fourteenth amendment to the federal constitution as defined and promulgated by the Supreme Court of the United States.

The next question to be considered is whether the notice given is sufficient to constitute due process of law. It is undoubtedly true that notice in some form, at some stage of the proceedings, of the intention of the common council to improve the street must be given.

The charter of 1898, section 28, provides: "That no grade or improvement mentioned in section 127 can be undertaken or made without ten days' notice thereof first being given in some daily newspaper published in the City of Portland."

The common council had selected a daily newspaper as the official city paper, and had authorized it to do the printing of the city notices, and when the common council caused the resolution to be passed describing the character of the proposed improvement as provided by section 127 of the charter, and caused the notice to be published in the official newspaper for ten days as required by the charter, and a notice was posted along the proposed work as provided by section 128 of the charter, notifying all persons interested who so desired to file with the auditor written objections or remonstrances against said work of improvement, they acquired jurisdiction to do the work.

Paulsen v. *Portland*, 149 U. S. 30-37.

Thereupon it became the duty of the property-owners along the street who were declared by the law to be liable for the cost of this improvement to take notice of all the proceedings that the council must take in order to comply with the charter provisions. Among these proceedings would be the levy and collection of the assessment.

Hagar v. *Reclamation Dist.*, 111 U. S. 701.
Parsons v. *Dist. of Columbia*, 170 U. S. 45.
Fallbrook Irrig. Dist. v. *Bradley*, 164 U. S. 112.
Spencer v. *Merchant*, 125 U. S. 345.
Paulsen v. *Portland*, 139 U. S. 30.
Mattingly v. *Dist. of Columbia*, 97 U. S. 687.
Bellingham Bay Co. v. *New Whatcom*, 172 U. S. 318.
Wight v. *Davidson*, 181 U. S. 371.

The plaintiffs in the case at bar must admit that they had due notice of what the council proposed to do, for they allege in their complaint that they filed their remonstrance against this improvement, which remonstrance, after consideration by the common council, was refused. (Abstract, p. 5.)

Thereafter the common council passed a time and manner ordinance, providing for a proposed improvement which conformed in all particulars to the resolution of intention previously adopted and published by the council, and against which resolution the plaintiffs herein had directed their remonstrances. This ordinance was duly approved by the mayor, and thereupon a certified copy was transmitted to the board of public works. The board of public works

ordered the city engineer to prepare plans and specifications, which were made and filed with the board. These plans gave in detail the cost of this improvement as against each lot within the limits of the proposed improvement. When these plans had been filed with the board by the city engineer, the board caused a notice to be published for five consecutive days in the official paper that had published the notice of intention, calling for bids for the work and referring to the estimates and specifications of the engineer on file.

Upon the day named for submitting bids the bids were publicly opened and canvassed in the presence of all parties concerned, or who desired to investigate the matter, and Lind & Manning, the defendants herein, were the lowest and best bidders, and the work was awarded to them. They thereupon entered into a contract which was filed with the board, and duly entered into a bond to complete the contract according to the terms and specifications of the time and manner ordinance. The work was done under the supervision of the city engineer and the board of public works, and when the improvement was completed the city engineer filed with the board a written acceptance of the work. Thereupon the board published a notice for six consecutive insertions in the official paper, stating therein the time and place wherein any written objections to the acceptance of said work, or any portion thereof, might be heard, and notifying all persons to appear and file objections, if any they had. At the time set for hearing objections to the work no person appeared to object thereto, and it appearing to the satisfaction of the board that the work had been completed as required by the contract and time and manner ordinance, which in

all things conformed to the resolution of intention as published, they approved of the work and referred it to the common council for an assessment. Thereupon the auditor prepared, as provided in section 138 of the charter, an assessment. Each lot or part thereof within the limits of Yamhill street as improved abutting upon the street were made liable for the full cost of improving the street in front of and abutting upon it, and also the proportionate share of the cost of improving the intersections was assessed upon the lots situated in the quarters of the four regular blocks adjoining such intersection, five-ninths of the cost of the corner to the first fifty feet and four-ninths of the cost to the lot on the next inside, as laid out in the plats. It will be remembered that the statute had provided for regular lots and blocks, regular lots being fifty by one hundred feet and blocks two hundred feet square. All the lots and blocks assessed in the case at bar were regular. This assessment was a public record and prepared in the office of the city auditor as provided by the charter, and it was thereupon submitted to the common council, and when they had ascertained or determined the proportionate share chargeable to each lot or part thereof, they declared the same by ordinance and directed the auditor to enter a statement of the probable cost in the docket of city liens.

Thereupon, under the provisions of the charter, another notice was published for ten consecutive days, and a notice also mailed to each property-owner and each plaintiff herein that an entry had been made of the probable cost in the docket of city liens, and that the same would become due and payable upon the giving of the ten days' notice. This

notice contained the names of each of the owners, the number of the lot and block, described the proposed improvement for which the assessment was made, and the probable cost assessed against each lot. So far as the assessment itself was concerned, and the description of the property, they are an exact copy of the ordinance, a synopsis of which is found at page 7 of the Abstract. If there was any mistake in the assessment, the plaintiffs clearly had a right to apply to the common council to have the same corrected, for the charter, sections 153 and 154, provides that in case it is found that there was either a surplus or a deficit in the assessment for probable cost, the council must ascertain and declare the same, and when so declared, it shall be entered in the docket of city liens. The ordinance declaring the probable cost was passed May 16, 1899, and thereupon the notices were immediately issued. (Plaintiffs' Complaint, Abstract, p. 8.) The plaintiffs not having paid their assessment, or filed or made any objections thereto, on the 15th day of September, 1899, the council caused a warrant to be issued to the chief of police, directing him to proceed to collect the assessments. Thus it will be seen that if there were any errors in the assessment, the plaintiffs had from the 16th day of May to the 15th of the following September before the council undertook to enforce the assessment. The plaintiffs did not challenge the regularity of the proceedings, or apply to the council for inquiry into the justice of the apportionment, nor did they commence any suit until after the warrant had gone to the chief of police for the sale of the property. Furthermore, all the parties had paid their assessments with the exception of the five plaintiffs, long before the said

plaintiffs sought any relief in the court.

Paulsen v. *Portland*, 149 U. S. 30, p. 42.
Lent v. *Tillson*, 140 U. S. 316.

Thus it will be seen that four separate and distinct notices were published, viz.: First, a notice was published on the 23d day of November, 1898, for ten days, of the intention of the council to improve this street, inviting all parties to remonstrate against the same. Second, on the 17th day of January, 1899, the board of public works gave notice for five days that it would receive proposals for doing this work, calling attention to the plans and specifications of the city engineer, which contained an estimate of the probable cost, and designating the amount to be assessed to each lot affected thereby. Third, on the 9th of May the board gave notice that the contract was completed, and for all persons interested to file objections, if any they had. And fourth, on the 9th of May, when ten days' notice was given that an assessment of the probable cost had been made. This notice was also mailed to each of the plaintiffs. Thus it will be seen that during all the time that the council was acting in reference to the improvement, from the 23d day of November, 1898, to the 9th of May, 1899, the plaintiffs received four distinct notices by publication, two of which were also mailed to the plaintiffs. Were these notices sufficient to attract the attention of the property-owners to the fact that their property would be assessed for the cost of this improvement? They knew what the cost was when they appeared and objected to the making of the improvement, because the cost, they alleged, would be in excess of what

they claimed the benefits from the improvement would be.

In *Bellingham Bay Co.* v. *New Whatcom*, 172 U. S. 318, the court, in speaking through Mr. Justice Brewer, on the duty of property-owners, says: "That notice of the reassessment was essential is not questioned," citing cases, "and that constructive notice by publication may be sufficient is conceded: *Lent* v. *Tillson*, 140 U. S. 316, 328; *Paulsen* v. *Portland*, 149 U. S. 30; but the contention is that the notice which was provided for, and which was in fact given, was insufficient, because it was only a ten days' notice."

After considering the question of ten days' notice and the relations of the parties and the knowledge that they must have had that the improvement is to be paid for by an assessment against the adjoining property, the court says: "In view, therefore, of the character of the improvement, the residence of the plaintiff in error, the almost certainty that it must have known of the improvement and that it would be expected to pay for them, it is impossible to hold that a ten days' notice was so short as to be absolutely void. And especially is this true when the supreme court of the state in which the proceedings were had has ruled that it was sufficient. Before proceedings for the collection of taxes sanctioned by the supreme court of a state are stricken down in this court, it must clearly appear that some one of the fundamental guarantees of right contained in the federal constitution has been invaded."

In *Paulsen* v. *Portland*, 149 U. S. 30, a case certified from the Supreme Court of the State of Oregon, reported in

the 16th Oregon, page 450, where the exact provisions found in our present charter were then in force, all of sections 95, 96, 97, 98 and 99, of the charter of the City of Portland of 1882, with the exception that under the charter of 1882 a petition must be presented by a majority of the property-owners before an improvement could be initiated, and the supreme court of the state held that this published notice of intention to construct a sewer, which the law provided should be in the same manner as for street assessment, would be sufficient to comply with the law.

Paulsen v. *Portland*, 149 U. S. 37-38.

The ordinance authorizing the sewer defined the district. The court says that there is no notice required or assent needed of the taxpayers as required by this ordinance. The same principle would apply to the act of the legislature in creating the district that should be liable for the cost of the street improvement. The viewers gave notice by publication of the time and place where they could meet and it was held that this notice was sufficient for all purposes to give the council jurisdiction to lay the sewer and assess the cost against the property benefited. After the assessment was completed and notice was published, exactly as the last notice was published in the case at bar, that an assessment for the probable cost had been made and entered in the docket of city liens.

In *Paulsen* v. *Portland*, 149 U. S. 30, at page 42, Mr. Justice Brewer, in discussing this phase of the question, as to the duty of the property-owners, says:

"Now, without deciding that this notice is sufficient notice to bring the proceedings within 'due process of law,' it is worthy of remark that during the ten days of publication, made as required by said section 104 and section 2 of ordinance 5162, the plaintiff did not challenge the regularity of the proceedings, or apply to the council for an inquiry into the justness of the apportionment, nor did they commence any suit until a month after the time when warrants for the collection of delinquent assessments had been ordered by the council. In other words, only after payment had been made by a portion of the taxpayers did these plaintiffs ask any relief."

The same conditions are true in the case at bar. All of the property-owners except the plaintiffs herein paid their assessment prior to the 15th day of September, 1899. (Abstract, p. 8.) Nearly four months after the ordinance was passed and approved, declaring the probable cost, and notice being published and sent, postpaid, to each of the property-owners, of the entry of the assessment, and they stood by and made no objection to the same, and the statute particularly provides that an assessment shall not be collected until ten days' notice is given by publication and mailing to the owners.

The Supreme Court of the State of Oregon in the case at bar has held that a notice was sufficient to give jurisdiction and was "due process of law." In *Lent* v. *Tillson*, 140 U. S. 316, the court held that where the report of the officers showing the property taken and assessed for the opening of Dupont street should be left in the office of the board

for thirty days for free inspection of all parties interested, and that notice of the same as so open for inspection was "due process of law," and not contrary to the fourteenth amendment to the federal constitution.

In *Wight* v. *Davidson*, 181 U. S. 371, the court held that an order of publication made by the court directing all persons interested in the proceedings to appear in the court and show cause why the prayer of petitioner should not be granted, was sufficient and gave opportunity to all persons interested to show cause, if any they had, why the prayer of the petitioner should not be granted, and that such notice must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the act of congress would subsequently be had. And if the appelees did not avail themselves of this opportunity, the court and jury proceedings according to law were not to blame.

In *Bauman* v. *Ross*, 167 U. S. 548, it is held that a notice published of the proposed proceedings warning interested parties to attend court and to continue in attendance until the court shall have made a final order in the premises, was due notice and due process of law.

The Supreme Court of the State of Oregon in *King* v. *Portland*, 63 Pac. 2, in speaking of the question of notice, says (p. 5): "The manner of notice and the specific period of time in the proceeding when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property, or the lien thereon is irrevocably fixed. So it has been held that it is sufficient

if the party is accorded the right of appeal or to be heard upon an application for abatement. (See *Towns* v. *Klamath County*, 33 Or. 225; *Weed* v. *City of Boston*, 172 Mass. 28), or the assessment is to be enforced by a suit, to which he is to be made a party (*Hagar* v. *Reclamation Dist.*, 111 U. S. 701; *Walston* v. *Manning*, 128 U. S. 578), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined: *McMillan* v. *Anderson*, 95 U. S. 37. In such case he cannot be heard to complain that his property is being taken without due process of law. The case of *Paulsen* v. *City of Portland*, 149 U. S. 30, covers the question of the right to notice and a hearing quite fully; and it is significant that special reference is made to the ten days' notice required to be given under section 104 of the charter as it then stood, after the assessment had gone upon the docket of city liens, and before the collection can be proceeded with, which is almost the exact provision now contained in section 141. While the court at the time declined to decide that such a notice was sufficient, yet, if the cause had been dependent upon it alone, it is not altogether clear that it would have held it insufficient. So it was held by this court in conformity with the prevailing rule, that, if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking without due process of law: *Wilson* v. *City of Salem*, 24 Or. 504.

Furthermore, there could be no sale of the property until the plaintiffs had ample time to make application for all appropriate remedies, and we submit that within the rule laid

down by the Supreme Court of the State of Oregon and the Supreme Court of the United States, a party cannot complain of want of due process of law where he has an opportunity to litigate in the ordinary courts of justice the legality of any proceedings, and that the very fact of the plaintiffs bringing this suit in the court below, *ipso facto* established due process of law; but the plaintiffs complain and assign as error that they had no opportunity to be heard, and that the legislature did not delegate to the common council authority to order and determine the question of benefits to be assessed against the property, and for that reason no notice or opportunity to be heard was given upon the question of the apportionment of benefits.

It has been so frequently decided upon full consideration by so many courts of the Union that the legislature has the power to select the district, and that it is not contrary to the fourteenth amendment of the Constitution of the United States for the legislature to make such a selection, and that the fourteenth amendment was not designed to interfere with the states in the making of these selections, that I shall undertake to present but a few of the federal authorities sustaining that proposition.

In *Bauman* v. *Ross*, 167 U. S. 548, it is held that the legislature in the exercise of the right of taxation has the authority to direct the whole or such part as it may prescribe of the expenses of a public improvement, such as the establishing, the widening, the grading or the repair of streets to be assessed upon the owners of the land benefited thereby, citing a long list of cases, and that this authority has been

repeatedly exercised in the District of Columbia by congress with the sanction of this court. The class of land to be assessed for the purpose may be determined either by the legislature itself, by defining the territorial district, or by other designation; or it might be left by the legislature to the determination of commissioners and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by the commissioners (pp. 589, 590).

In *Wight* v. *Davidson*, 181 U. S. 371, the court, speaking through Mr. Justice Shiras, declares that the legislature in the exercise of its power of taxation has authority to direct the whole or such part as it may prescribe of the expenses of a public improvement, such as the establishing, widening, grading, or repair of streets, to be assessed upon the owners of the land benefited thereby, and that such authority has been repeatedly exercised in the District of Columbia by congress with the sanction of this court, citing *Willard* v. *Presbury*, 14 Wall. 676; *Mattingly* v. *Dist. of Columbia*, 97 U. S. 687; *Shumaker* v. *U. S.*, 147 U. S. 282; and that the legislature by defining the territorial district determines what land shall be assessed, and that "the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature." *Detroit* v. *Parker*, 181 U. S. 399, and in *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, the court says: "We have recently held that it was

not the intention of the fourteenth amendment to subvert the systems of the states pertaining to general and special taxation; that the amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the fifth amendment against similar legislation by congress and that the federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker*, *French* v. *Asphalt Paving Co.*, *Tonawanda* v. *Lyon*, *Wight* v. *Davidson*, ante, 324, 389, 371."

In *Williams* v. *Eggleston*, 170 U. S. 311, the court says: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

In *Parsons* v. *Dist. of Columbia*, 170 U. S. 45, p. 56, it is laid down that special assessments are a branch of the taxing power and included within it whether the expense shall be paid out of the general treasury or assessed upon the abutting property or other property specially benefited, and that the method to be devised for the assessment, according to the present weight of authorities, is considered to be a question of legislative expediency. In *Davidson* v. *New Orleans*,

96 U. S. 107, it was complained that the assessment was not made according to a proper apportionment, and that the amount of the assessment upon plaintiff's land was excessive, and that part of the land received no benefit at all. To that argument the supreme court replied that it was a matter of detail so far as that court was concerned. It was not a constitutional question, therefore was not reviewable.

In *Walston* v. *Nevin*, 128 U. S. 578, an assessment was attacked upon the ground that it was an arbitrary and illegal method of assessment, and the court held that the manner of the assessment was for the decision of the legislature, to which body the discretion was committed to create the district and provide the means of payment.

In *Bell's Gap R'd Co.* v. *Penn.*, 134 U. S. 232, the court says: "We think we are safe in saying that the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation."

And, as is said by Judge Cooley (Cooley, Tax., p. 623): "That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded closed."

In *County of Mobile* v. *Kimball*, 102 U. S. 691, the question was whether a tax for the improvement of the river, harbor and bay of Mobile should be levied solely upon the county of Mobile and not at all upon the rest of the state, which it was conceded would derive benefit from the improvement. Justice Field says: "It may be that the act in imposing upon the county of Mobile the entire burden of

improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement which was to benefit the whole state, among its counties. But this court is not the harbor in which the people of a city or county can find refuge from ill-advised, unequal and oppressive state legislation."

In *Hagar* v. *Reclamation Dist.*, 111 U. S. 755, the court, speaking of special assessments, says: "Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that to some extent inequalities may arise."

In *Spencer* v. *Merchant*, 125 U. S. 355, the court laid down the rule that is invariably followed, that the legislature, in the exercise of its powers of taxation, has a right to direct how the tax shall be laid, and the determination of the district and that its determination is conclusive.

In *Parsons* v. *Dist. of Columbia*, 170 U. S. 45, congress laid down an arbitrary rule as to the amount of assessment for a water pipe. The court says that while the power to assess and collect these assessments is not purely arbitrary and unregulated, it is constitutional and valid.

It seems to us that the sole question to be considered is whether the law has a reasonable relation to the object sought to be accomplished. If it has, the law should be sustained, and any court which would undertake to lay down

a rule of exact equality would find that it had entered upon a task that must necessarily result in endless confusion. So far as the questions of notice and apportionment are concerned in the case at bar, it seems to us that under the rule laid down in all the adjudged cases, notice sufficient to constitute due process of law under the federal constitution has been given, and that the question of apportionment is a legislative question, and all persons under the same circumstances and under the same conditions are treated alike, and thus protected under the law. Favoritism and all the conditions that are sometimes charged as existing where municipal bodies are allowed a discretion, are barred in the case at bar.

As was said by Judge Dillon: "It may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay for the improvement in front of his own property than if the cost were assessed upon the basis of frontage or of supposed benefits received. Still it seems to the author difficult to find satisfactory and solid ground on which to discriminate the cases so as to hold that one is within the constitutional power of the legislature, and the other is not": 2 Dillon, Mun. Corp. (4th ed.), § 753.

"The legislature, when it fixes a district itself, is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizens have no constitutional right to further hearing upon that question."

Fallbrook Irrig. Dist. v. *Bradley*, 164 U. S. 112-174.

"And unless the legislature decides the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken."

Spencer v. *Merchant*, 125 U. S. 345.
Walston v. *Nevin*, 128 U. S. 578.
Fallbrook Irrig. Dist. v. *Bradley*, 164 U. S. 112-174.

And when the Supreme Court of the State of Oregon decided that the particular formalities required in the case at bar gives the parties notice and opportunity to be heard, such decision presents no federal question so long as the person is not deprived of his property without due process of law. This paramount requirement being fulfilled as to other matters, the state interpretation of its own law is controlling and decisive.

Lombard v. *West Chicago Park Com.*, 181 U. S. 33.
Spencer v. *Merchant*, 125 U. S. 345.
Castillo v. *McConnico*, 168 U. S. 674.
Eldridge v. *Trezevant*, 160 U. S. 452, pp. 465, 468.

The apportionment of the cost under the statute is a legislative apportionment. It is the idea of the legislature of the State of Oregon as to which method is the better in the City of Portland, as to which method will come the nearest to doing exact justice to all parties concerned.

The wisdom of the legislature in adopting this method of assessment has been demonstrated by the fact that the cit-

izens of the City of Portland have quite generally accepted this method of assessment, and it has been sustained and has not been the subject of criticism of the court or bar in adjudged cases. This method of assessment has never been questioned in the City of Portland between 1866 and 1900, and although numerous cases have gone to the supreme court of the state, the law has frequently been affirmed. Another question that the court must take into consideration and which undoubtedly influences the legislature is the fact that our western cities are growing and improvements are made by degrees as the demand in each particular community is brought to the attention of the common council. Streets are not laid out and improved their whole length, as they are in older eastern cities, where the population, value of property and necessities and demands of the people are such that a street is improved throughout its length. It is nothing uncommon in our western cities to find that our streets are improved under various ordinances as population increases and the limits of the street are extended. I will undertake to say that there is not a single street in the City of Portland that has ever been improved its entire length under one ordinance. As a matter of fact, the improvements are made usually one, two and three blocks at a time, and general improvement of a street for any considerable distance has never taken place, except after the street has been improved in the early days by various kinds of improvements, and eventually becomes of sufficient importance to put down a more permanent and fixed improvement. As a rule in a new and growing district in Portland, the citizens ask in the first place to have the street graded and sidewalked, then,

as their property becomes more valuable and they have eased the burdens connected with the securing of a home, they will ask for the surface of the street to be improved. For instance, Yamhill street, four blocks of which is in controversy in this case, has been, during the last thirty years, improved in small sections at a time under separate ordinances, until now nearly a mile of it is completed.

And as I have said, it seems to me that if this power is lodged in the legislature, that if the legislature is authorized to select a district and compel the property within the district to pay the tax, or if the legislature is authorized to order an improvement to be made, as it did in *Lent* v. *Tillson*, *supra*, and define the district that shall pay for it, it has the same power that it had in *Spencer* v. *Merchant*, *supra*, to declare what the burden shall be and as to how it shall be distributed, subject only to the limitation found in the federal constitution that persons under like circumstances shall be treated alike.

The law clearly treats every person alike. Cases may arise when the improvement will not be a benefit to the property. Such a case arose in the City of Portland, and our circuit court and supreme court held that the city was without authority to make the improvement.

O. & C. Ry. Co. v. *Portland*, 25 Or. 229.
Paulsen v. *Portland*, 16 Or. 450.

In these cases the court held that if the property was so situated that it could not possibly receive any benefits from

the improvement, it (the court) would interfere to prevent wrong, and it is a remarkable fact that while this method of assessment has been in vogue in many cities for a great many years, there has not one case been taken up for review to the supreme court, but there have been hundreds where the apportionment was made by persons selected for that purpose upon the theory of benefits, or where the assessment was according to the front foot or superficial area of the whole district, as in *Davidson* v. *New Orleans, supra*, and *Fallbrook Irrig. Dist.* v. *Bradley, supra.*

If legislative discretion in those cases will stand, it seems to us that it must stand in the case at bar. For instance, take *Davidson* v. *New Orleans* and *Fallbrook Irrig. Dist.* v. *Bradley*, it must be conceded from the very nature of things, by a natural law, that it is impossible for a given number of people to receive the same benefits from a public improvement that is assessed by superficial area. The writer of this brief has been over the territory included in the Fallbrook Irrigation District case. He finds cities with brick buildings, he finds pieces of land with hillocks upon them, he finds many things that show that exact equality has not been done, but he finds that on the whole, property has been benefited, and that after all, there must be a rule laid down and that the only authority which can lay down the rule is the legislature, and that when it has laid down a rule that treats all alike under like circumstances, the fact that two different parties may be slightly differently situated, one paying slightly more than another upon the same street, will be treated by the court as a matter of detail with which the

court is not concerned: *Davidson* v. *New Orleans, supra.*

It is respectfully urged that the decision of the Supreme Court of the State of Oregon be affirmed.

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